Air America Association Member Commentary dated August 15, 2011, by Gary B. Bisson, Esq.

DNI Air America Retirement Report to Congress is Released: DNI Concludes Congress Should Not Grant Retirement Benefits to Air America Employees for Their Proprietary Services

As required by Section 1057 of the Fiscal Year 2010 National Defense Authorization Act, DNI finally released its Report on July 28, 2011, exactly 15 months beyond the required due date.[1] At page 26, the penultimate paragraph in the report states:

> "...we do not believe that there is a clear and compelling case for granting *universal and retroactive* Federal retirement benefits to former employees of Air America. Granting such benefits would undermine the national security utility of proprietaries, create a costly and unjustified precedent for granting such benefits to other proprietary employees, and *would not withstand legal or public scrutiny."* [Emphasis added.]

In reaching this conclusion, the Report (also @ page 26) relied on three self-established and somewhat specious criteria:

> **"Mission**. What serves, and does not disserve (sic), the continuing mission of the intelligence community with respect to granting Federal retirement benefits?"
>
> **"Precedent.** How did the employees view their status and how have similarly situated personnel been treated?"
>
> **"Extenuating Circumstances.** Are there unique circumstances that argue compellingly for differential treatment of Air America employees? Did the Government take or fail to take certain actions that...disfavored Air America employees?"
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> "In responding to this congressional tasking we...considered potential options in determining to do the right thing in this case. However, any option must fit into a framework of justified entitlement. We were unable to construct that framework, and *without finding or establishing a clear and compelling basis for granting Federal retirement benefits that would withstand public scrutiny and legal precedent*, we believe granting such benefits would not serve the interest of the intelligence community, the Nation, or the legacy of Air America." [Emphasis added.]

Under its **Mission** commentary, the DNI report states:

> "We believe granting Federal status to those employed in a proprietary organization is fundamentally contrary to the very nature of a proprietary organization and to the

[1]For background on some of the reasons advanced by DNI for this delay, see this author's Member Commentary in WINS #34-10, dated September 14, 2010.

> employees' ability to perform their mission as non-Federal employees serving the lawful purposes of the U.S. Government."

When parsed, the Report's conclusions do *not withstand public sc*rutiny, as follows.

1. Whether granting Federal status to proprietary employees is fundamentally contrary to the nature of proprietary organizations:
It is self-evident that the very nature of a proprietary organization is that it is a Federal instrumentality. Since the organization has this Federal status, so do its employees even though knowledge of that status may be limited within the organization, or even unknown.

2. Whether this status would impair the employees' ability to perform their mission as non-Federal employees:
Air America had two types of proprietary employees, e.g., those unaware of CIA ownership and those who were made officially aware ("witting") of such ownership by CIA employees working undercover as Air America employees. Clearly, all employees, witting or unwitting, or those under cover, performed their services in a highly exemplary and professional manner regardless of whether Agency ownership was known.

3. Would granting this Federal status for retirement purposes truly undermine the national security utility of proprietaries?
Beginning with the origins of the CIA, granting Federal status to proprietary corporation employees for retirement purposes has not undermined national security.[2] In the National Archives, there is the official declassified OSS War Report, issued in July of 1969. Volume 1 of this report, @ page 128, states:

> "Corporations, even though established for cover purposes, were recognized as bona fide government companies, under a Treasury ruling issued at the time of the liquidation of OSS. Employees of such corporations received credit toward government service longevity."

And again, in the Foreign Service Act of 1980, Congress granted credited service for Federal retirement purposes to 10 CIA proprietary organizations (listed at 5 U.S.C. 8332(b)(11)), including Radio Free Europe, Radio Liberty, Radio Free Asia and the Asia Foundation. Obviously, the national security utility of proprietary organizations has not been undermined by these prior grants of Federal retirement credit.

4. Would a Congressional grant of credited service create a costly and unjustified precedent for awarding such benefits to other proprietary employees?
This should not be the case if the Congress were to proceed to pass Air America retirement legislation notwithstanding the recommendation of the DNI Report. As in the case of the Foreign Service Act grants, Congress can state that no equitable precedent is intended for other proprietary employee

[2]This was previously mentioned in author's Letter to the Editor, published in WINS #21-09, dated June 9, 2009, seeking membership support on the pending Air America Report legislation.

entitlements by this enactment benefitting Air America proprietary services performed between 1950-1975.

More importantly, since the Judicial Reform Act of 1980, new credited service claims denied by OPM can only be appealed to the U.S. Court of Appeals for the Federal Circuit whose judicial precedents require Federal appointment documents to have been issued for an employee to be granted retirement credit for Federal service. Historically, this was not the case for administrative and judical credited service actions resolved prior to 1980. This factor, in particular if noted in the legislative history of Air America retirement legislation, should eliminate most, if not all, costly precedential value that might be claimed by any future proprietary employee's claim for credited services performed since 1980.

5. Would granting Air America employees Federal retirement credit fail to withstand legal or public scrutiny?
The authors of the DNI report seem to have forgotten that Congress, not Federal Agency lawyers, enacts Federal law. If Air America retirement credit is enacted by Congress, any and all legal scrutiny tests will be satisfied.

The authors also seem ignorant of the widespread public support for Air America retirement benefits that has arisen since this subject resurfaced following passage of the Air America Report legislation. A few examples are provided here, however please note that links do expire or otherwise disappear. As of this writing, these articles are active online:

ABC Action News 7, Tampa Florida, Air America Veterans Continue to Battle Government, by Alan Cohn, October 29, 2010.
http://www.air-america.org/News/documents/ABC_Tampa.pdf

Vancouver Sun, Some Ex-CIA Pilots Left Without A Pension Parachute, by Jonathan Manthorpe, September 27, 2010.
http://www.air-america.org/News/documents/Vancouver_Sun.pdf

Asia Times, CIA Skips on its Air America Bill, by John McBeth, September 22, 2010.
http://www.air-america.org/News/documents/Asia_Times.pdf

Association of Foreign Intelligence Officers, Weekly Intelligence Notes, CIA Drops the Ball on Air America - Again, by Gary B. Bisson, Esq., September 14, 2010.
http://www.air-america.org/News/documents/AFIO_Commentary.pdf

Atlanta Journal-Constitution, Government Benefits Only Fair for Covert Warriors in Vietnam, by Emory University Law Professor David J. Bederman, May 18, 2010**.**
http://www.air-america.org/News/documents/Atlanta_Journal.pdf

Under the category of **Precedent**, DNI's report states: "We believe there are no sound precedents for granting Federal retirement benefits to former employees of Air America." The report further takes issue with a statement by William J. Merrigan, Esq., a former Air America attorney, in a February 7, 2004 email sent to Richard Verma of Senator Harry Reid (D-NV)'s staff, as follows: "(Air America) was a government corporation and historically, by law and administrative determinations of the Civil Service Commission, employees of government corporations are Federal employees." The DNI report patently and incorrectly dismisses him by saying..."This statement is not supported by fact." Mr. Merrigan's statement was, of course, fully and completely accurate. The administrative record of Air America's employee cases (Hickler, Watts, Fink) discloses that the Civil Service Commission did, in fact, grant credited service to employees of Government corporations (without appointment documents) during the period of CIA ownership of Air America. It is true, as noted in the DNI Report, that the Court of Appeals for the Federal Circuit in Horner v. Acosta, 803 F. 2d 687 (1986) overruled these earlier Civil Service Commission actions and the Federal Personnel Manual which supported them. But the Commission did so *universally and retroactively* in 1986 long after Air America employee services had been performed. That action did not, and could not, erase the fact that historically the Civil Service Commission granted credited service to employees of Government Corporations simply by the mere fact of their employment.

Also, but misplaced, under this discussion of precedents, are the following DNI report statements:

> "Additionally, employees of Air America had no expectation of Federal status or benefits and no understanding that they were employees of the U.S. Government or the CIA."

and

> "The Air America employment contract, the absence of any claim of Federal status by employees [prior to Air America dissolution], and the wide difference between Federal and Air America retirement systems, indicate that there was no expectation of Federal status or retirement benefits." (Parenthetical matter added.)

Much importance is placed in the report that Air America employment contracts did not provide for Federal status or benefits. But to do so would have destroyed the cover that these were legitimate private sector employments! It was only after certain of these employees were made cognizant of CIA ownership that any understanding of Federal status was made official and thus the expectation that future Federal benefits would ensue.

Proprietary corporation employment contracts, by their very nature, must not provide for Federal status or benefits or create expectation of future benefits. Nevertheless, employees of the OSS proprietaries, Radio Free Europe, Radio Liberty, Radio Free Asia, the Asia Foundation and all of the other covert entities listed in 5 U.S.C. 8332(b)(11) were granted Federal status for retirement purposes, and most, if not all, of those employees *had no expectation of future Federal benefits or status.* Actual knowledge of Federal status or benefits at time of employment is, therefore, not essential to the issue of whether Federal employment has been created. Status of Government employment is a matter of fact, **not** of contractual consent. Historically, it was not essential for an authorized Federal employment officer to disclose that civil service employment was being offered. 37 Op. Atty. Gen. 7 (1932). As stated by former Attorney General William D. Mitchell, @ page 14 of this decision:

> "The failure of an appointing officer to take proper formal action should not be permitted to annul or obliterate the status to which an employee, *perhaps without his knowledge*, was entitled at any given time." (Emphasis added.)

Finally, under the DNI Report discussion of the **Extenuating Circumstances** category, none were found in a statement by William J. Merrigan, Esq., in his December 5, 2010 letter to Senator Webb (D-VA), that "...OPM changed its rules retroactively after the Vietnam war in a way that excluded Air Americans [Air America] among others, from Federal recognition..."

The Report found no extenuating circumstances because "Federal Courts had already ruled on this issue" in Horner v. Acosta (discussed above), **in 1986,**" denying benefits based on changes in OPM rules." This was, of course, Mr. Merrigan's point. It is self-evident that a retroactive OPM rule change can constitute an extenuating circumstance. The Congress found it so, in the case of employees of a U.S. Navy task force proprietary organization and some other personal services contract employees affected by the Acosta decision in section 110, of P.L. 100-238 (1988). The House of Representatives Report 100-374 on this legislation stated @ page 25:

> "While OPM's action may be appropriate as a matter of law[3], individuals who performed service prior to this policy change should be able to rely on published OPM instructions and prior administrative actions granting credit for such service. OPM actions in denying this credit have been extremely unfair, particularly in view of the apparent inconsistent administration of this policy in the early 1980's and the fact that it took four more years from the time OPM began denying retirement credit until it changed its publically available instructions."

Conclusion:

The long-overdue DNI Report on Retirement Benefits for Former Employees of Air America is a deep and bitter disappointment for everyone in the Air America community and its true friends throughout the U.S. intelligence community. Outsourced by DNI to Booz Allen Hamilton (at an estimated cost to the U.S. taxpayer of $350,000), heavily vetted and revised by the CIA from April to July 2011, the final report is extraordinarily flawed, particularly in justifying its conclusions which are merely touched upon here.

[3]The Acosta decision does not appear to be correct as a matter of law in the D.C. Court of Appeals for credited service cases filed prior to 1980. See Jankovic v. U.S., 84 F. Supp. 1355 (D.D.C. 1974). The U.S. Court of Appeals, D.C., in Spirides v. Reinhardt, 613 F. 2d 826 (1979) at 830, agreed with Jankovic. The extenuating circumstance here is that credited service cases cannot be filed in the D.C. District and Appeals Courts after 1980.

As such, the report, rather than its subject, cannot withstand public scrutiny. It is only hoped that in its wisdom, the U.S. Congress will disregard the report's recommendation, for many of the reasons outlined above, and proceed with enactment of long-deserved retirement benefits for employees of the CIA's most illustrious proprietary. Publically, the Central Intelligence Agency continues to champion Air America, its missions and its employees. Privately, their actions and reactions provide a different face on the relationship. This proprietary was created, administered and operated by the CIA to perform missions which the Agency could not, would not and should not have undertaken on its own. From its origins to its dissolution, everything Air America did was either at CIA's behest or with its concurrence. Contrary to the DNI report, the "legacy" of Air America is best (and most equitably) served by the same recognition accorded to other CIA proprietaries: Recognition in the form of accredited Civil Service status and retirement benefits. In failing to appropriately acknowledge this nearly 25 year contribution to the U.S. Government's strategic objectives, the Central Intelligence Agency, through DNI, has chosen to belittle, denigrate and ignore its own creation. A flagrant and genuine American tragedy.